

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA,

Case No. 8:03-CR-77-T-30TBM

v.

SAMI AMIN AL-ARIAN, et al.,

Defendants.

_____/

**MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS FOR VIOLATION OF THE POSSE COMITATUS ACT**

The terms of the 18 U.S.C. § 1385 (the Posse Comitatus Act), expressly prohibit the use of the military to enforce civilian laws:

Whoever except in cases and under circumstances expressly authorized by the Constitution or Act of Congress willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined more than \$10,000 or imprisoned not more than two years or both.

As Luther Martin of Maryland stated at the Constitution Convention” ... when a government wishes to deprive its citizen of freedom and reduce them to slavery, it generally makes use of a standing army.” *Laird v. Tatus*, 40 L.W. 4850, 4855 (1972).

In the instant case the government has utilized the military to monitor and translate conversations that were intercepted during the course of a F.I.S.A. wiretap. The government now seeks to utilize and may have already utilized the translations made by the military against these accused.

In discovery in this matter the government has provided some 21,000 documents described as tech-cuts. These tech-cuts provided the original translations of the conversations that were seized pursuant to the wiretap. The tech-cuts also provide the basis to believe that the government was utilizing the military. See Exhibits (1 through 7 appended to the Motion). Based upon the affidavit of Agent Myers, the defense believes that the tech-cuts or summaries thereof were placed before the Grand Jury and utilized in the preparation of the affidavit to support the search.

“5. Your Affiant presented substantial evidence to the Grand Jury of the United States District Court for the Middle District of Florida (FGJ) in this case. This evidence included court-approved intercepts of telephone conversations and facsimile transmissions both to and from the defendants during the past ten years.”

20. Virtually all of the telephone conversations and facsimiles obtained pursuant to the Court intercepts in this case have been in the Arabic language. The F.B.I. has retained numerous Arabic linguists to provide both summaries and verbatim translations of these calls in the English language. The translators are native Arabic speakers and your affiant believes their translations are accurate as the translations have been crossed checked among different translators. In preparing this affidavit, your affiant has relied on these English translations and summaries of the Arabic conversations and documents.”

Affidavit of Special Agent Myers.

Additionally, from the tech-cuts themselves it appears that the Military was making at least some of the calls, with respect to the relevance of given a conversation.

See Exhibit (1 through 7).

The purpose of the Posse Comitatus Act was to prevent the use of the military in civilian law enforcement.

[4] The Posse Comitatus Act was enacted toward the end of the Reconstruction era after the Civil War “for the purpose of limiting the direct active use of federal troops by civil law enforcement officers to enforce the laws of this nation.” *United States v. Hutchings*, 127 F.3d 1255, 1257 (10th Cir. 1997) (internal quotation omitted); see generally

Mark David “Max” Maxwell, the Enduring Vitality of the Posse Comitatus Act of 1878, 37 Prosecutor 34, 34 (2003) (discussing the historical origins of the PCA). The PCA provides:

Whoever except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army will be imprisoned not more than two years, or both. 18 U.S.C. § 1385, It was intended “ ‘to prevent the use of the federal army to aid civil authorities in the enforcement of civilian laws.’ ” *Nelson v. Geringer*, 295 F.3d 1082, 1092 n. 11 (10th Cir. 2002) (quoting *Gilbert v. United States*, 165 F.3d 470, 472 (6th Cir. 1999)).

For the Court to do less than require that the Government comply with the law would place the courts in a position of condemning the individual for breaking the law, yet on the other hand encouraging the Executive to do so. The hypocrisy of such a position is obvious. The only way that the courts can insist that those charged with enforcing the law are not encouraged to violate it under these circumstances is to suppress the illegally obtained evidence.

As the Supreme Court has stated, “A conviction resting on evidence secured through a flagrant disregard of the procedures which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law”. *McNabb v. United States*, 318 U.S. 332, 345; *Elkins v. United States*, 364 U.S. 206, 223.

The Supreme Court has also stated time and time again that illegally and unconstitutionally obtained evidence may not be permitted to undermine our system of justice. In *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the Court stated.

The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the character of its own-existence. *Mapp*, at 659

In *Elkins v. United States*, 364 U.S. 206, the Court explained:

Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. *Elkins*, at 208.

If the Executive can violate the laws of the United States, can solicit violations of Congressional enactments, and is rewarded for doing so by the courts by permitting the fruits of this unfortunate harvest to serve as the basis for conviction, then where is respect of law and observation of due process to be found? There is only one way to insure respect for law and that is for the courts to insist that those charged with enforcing the law set the best examples. As Justice Brandeis stated in *Olmstead v. United States*, 277 U.S. 438 (1928):

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 468.

In *Anderson v. United States*, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829, the Court stated:

Where there was a working arrangement between federal officers and county sheriff which made possible abuses under which incriminating statements were obtained from accused, the fact that the federal officers themselves were not formally guilty of illegal conduct did not affect admissibility of evidence which they secured improperly through collaboration with state officers.

It is thus clear that this type of activity, if permitted to continue, would encourage unchecked military activity heretofore forbidden by the laws of the land, would remove

an important safeguard which had kept this country free from executive and military tyranny for almost two hundred years, and would open the door to a mobile national police force at the disposal and discretion of the Executive Branch official. For while the F.B.I. and the Air Force may claim that they were only investigating terrorism, Justice Brandeis warned us long ago, "That experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in invidious encroachment by men of zeal well meaning but without understanding." *Olmstead v. United States*, 277 U.S. 439 (1928).

Dated: November 2nd, 2004

Respectfully submitted,

/s/Linda Moreno
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
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